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No. 76-30

In the Supreme Court of the United States

OCTOBER TERM, 1976

ROBERT DIACO AND JOHN HOLLAND, PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
*Solicitor General,
Department of Justice,
Washington, D.C. 20530.*

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Petitioners contend that the trial court should have required the victim of the crime to submit to a psychiatric examination to determine his competency; that the indictment was invalid because it was based primarily on hearsay; and that the statute here involved should not have been applied to them because there was no showing that their activities affected interstate commerce.

After a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted of using extortionate means in attempting to collect an extension of credit, and of conspiracy to do so, in violation of 18 U.S.C. 894. Petitioner Diaco was sentenced to 18 months' imprisonment and fined \$5,000. Petitioner Holland was sentenced to six months' imprisonment

followed by two years' parole and fined \$2,500. The court of appeals affirmed (Pet. App. A).

In August 1973 petitioner Holland and Vincent Bono severed their partnership in an employment agency in New Jersey (Tr. 2.61, 2.63). Holland was to take over their offices in East Orange, New Jersey; Bono was to take sole control of offices in Teaneck and Clifton, New Jersey, and to pay Holland \$30,000 for his interest in those branches (Tr. 2.63-2.64). By October 1973 Bono had paid Holland \$7,800, but he then ceased making payments (Tr. 2.64).

On March 13, 1974, Bono received a phone call from an unknown male who told him he owed them money. During the conversation the caller warned, "you owe John Holland money. John Holland owes us money. You owe us money. We don't care how we get it. We know where you are" (Tr. 2.65, 2.71, 2.74). Frightened, Bono called Holland and arranged to meet him later that day (Tr. 2.75-2.78). At the meeting in Holland's office, Holland introduced Bono to petitioner Diaco, who said that he and Holland were partners and that one of his men had called and threatened Bono earlier (Tr. 2.79, 2.81, 3.18). Diaco gave Bono until Friday to get some money or else Diaco would "take care" of him (Tr. 2.83). Bono agreed to pay \$2,500 on Friday and \$125 per month thereafter for 5 years (Tr. 2.84).

Bono was unable to obtain the money for the Friday payment and received another threatening phone call, this time from Diaco himself (Tr. 2.88-2.89). On the following Monday, Bono contacted the Federal Bureau of Investigation and told an agent that he thought he was going to be killed (Tr. 2.90). On Thursday Bono, with a tape recording device strapped to his body, met with Diaco

and Holland to discuss his situation (Tr. 2.92, 2.94, 2.124). On the way to the restaurant where the meeting was to take place, Diaco displayed a knife to Bono and told him it was used on "special people" like "[f]riends that don't pay their debts" (Tr. 2.124-2.125, 3.15). The district court declined to order Bono to submit to a psychiatric examination to determine whether he was competent to testify as a witness.

1. The decision whether to order a witness to undergo a psychiatric examination is entrusted to the trial judge's wide discretion. *United States v. Heinlein*, 490 F. 2d 725, 730 (C.A. D.C.); *United States v. Barnard*, 490 F. 2d 907, 912 (C.A. 9), certiorari denied, 416 U.S. 959. Because such examinations may seriously impinge on a witness's right to privacy and serve as a tool of harassment, the presumption against ordering such examinations must be overcome by a strong showing of need. *United States v. Benn*, 476 F. 2d 1127 (C.A. D.C.). Petitioners failed to meet this standard.

Petitioners filed an affidavit of Bono's wife, one from his mother-in-law,¹ and one from a former employee of Bono's, which "relate[d] to a series of disputes over wages" (Tr. 1.5). The trial judge properly viewed these affidavits with scepticism and concluded that they cast no doubt upon Bono's mental competence to be a witness. The court was sensitive to petitioners' needs, however, and ruled that if "I hear the witness and any substantial doubt is raised in my own mind * * * then I will feel free to order such an examination" (Tr. 1.7).

¹This affidavit first was filed in connection with what the trial judge here characterized as "a bitter divorce and custody fight" (Tr. 1.4, 1.5).

The court did not abuse its discretion by proceeding in this manner.

2. Petitioners' objections to the use of hearsay evidence before the grand jury are answered by *United States v. Calandra*, 414 U.S. 338, 344-345, and *Costello v. United States*, 350 U.S. 359.² These cases establish that "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence" (*United States v. Calandra*, *supra*, 414 U.S. at 345).

3. Petitioners' contention that 18 U.S.C. 894 should not apply to them absent a showing either that their threats affected interstate commerce or that they were affiliated with organized crime is insubstantial. In *Perez v. United States*, 402 U.S. 146, 154, this Court held that: "[w]here the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class" (emphasis in original; citation omitted). See also *United States v. Meese*, 479 F. 2d 41 (C.A. 8); *United States v. Hunter*, 478 F. 2d 1019 (C.A. 7). Petitioners used extortionate means in their efforts to collect payments on an extension of credit; therefore they were properly prosecuted under Section 894.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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²Moreover, since petitioners failed to challenge their indictments on this ground before trial (Pet. 10), they have waived their objection. Fed. R. Crim. P. 12(b) and (f).